

November 14, 2005

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
ATTN: RM 10865

Re: Comment on the Federal Communications Commission amendment of the Communications Assistance Law Enforcement Act of 1994 as it applies to teaching and research institutions.

Dear Ms. Dortch:

Thank you for the opportunity to comment on the amendment to the Communications Assistance Law Enforcement Act of 1994 (ET Docket No. 04-295 (Rel. Sept. 23, 2005), published 70 Fed. Reg. 59,664 (Oct. 13, 2005) ("Broadband CALEA Order" RM 10865).

The history is clear that the Congress did not intend for CALEA to cover higher education networks and, thus, we urge the Commission to exempt educational and research institutions and higher education networks from CALEA's reach under the Final Rule. Moreover, the lawful surveillance access that the Rule is designed to enable already exists, as do alternate approaches that are more cost effective than requiring the potential revamping of our entire computer network system over the next 18 months. We are also concerned that the administrative rulemaking process does not provide an appropriate forum to address the multiple legal, technical, and civil liberties issues affecting not-for-profit educational institutions in this comment period.

The Congress expressly excluded "private networks" from CALEA's coverage and explicitly exempted equipment, facilities, or services that support the transport or switching of communications for private networks. As a private institution of higher education, Duke University falls outside the Congress' definition of "telecommunications carrier," as we do not offer "services as a common carrier ... for

hire.” Duke University is neither “a common carrier” nor do we provide telecommunications services “for hire.”

We recognize that the unsettled relationship between the Fourth Amendment and the rapid advance of new technologies creates an environment of tension and uncertainty in regard to privacy and civil liberties. We are not unmindful of the federal government’s continuing obligation to protect our national security, and we recognize the need to provide law enforcement agencies with the appropriate tools and processes to fulfill these important responsibilities. Indeed, Duke and other universities work with these agencies in many ways to improve national security. Duke and other American colleges and universities have an exemplary record of cooperating fully and promptly with federal authorities on those very rare occasions that the government requests such information with appropriate warrants. We are not aware of any indication that law enforcement agencies have found higher education’s compliance with surveillance requests to be deficient.

In this context, we fail to see the compelling government interest in the specific surveillance techniques required under the proposed Final Rule. Given Fourth Amendment considerations, a careful and narrowly drawn method for compliance could be appropriate, but that certainly is not what the contemplated Final Rule proposes.

The imprecise wording of the regulation also creates uncertainty regarding the scope and costs of technology required for compliance. This regulation could require more extensive modifications to our network infrastructure than could be possible to complete during the 18-month time frame set forth by the Final Rule. This is primarily due to the fact that the technology for the packet-switched network utilized by Duke is radically different from the technology employed in the circuit-switched telephony systems, which readily facilitate a more focused and precise real-time surveillance. The dynamic nature of packet-switched network and ancillary technologies creates a more complex environment for the surveillance goals intended under this statute. An example of this difficulty lies in the identification and surveillance of individuals through Internet Protocol addresses, which in some cases are randomly assigned and could easily impart an inaccurate reflection of an individual’s use of the network.

Given the inexactitude of the requirements under the proposed Final Rule, in the most extreme case we estimate the cost to make the required technical changes to Duke University’s networks over the next 18 months could be as high as tens of millions of dollars. Such institutional investments, stemming from an unfunded government mandate and absent a documented compelling government interest, would create unnecessary burdens on our institution’s budget, at the expense of our teaching and research programs and their contributions to American society.

The most expeditious solution to these concerns would be to exempt higher education's networks from CALEA. Failing that, we believe the complex and multifaceted issues we have identified do not easily lend themselves to an abbreviated administrative rule making process. Given their importance to American society and to higher education, I respectfully suggest that the Federal Communications Commission return the matter to the United States Congress for hearings that will permit a comprehensive review of these important issues for the American people.

Thank you for consideration.

Sincerely,

Richard H. Brodhead